

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 TIFFANY R. S.,

11 Plaintiff,

12 v.

13 COMMISSIONER OF SOCIAL  
14 SECURITY,

15 Defendant.

CASE NO. 3:18-CV-05304-DWC

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

16 Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of  
17 Defendant's denial of Plaintiff's applications for supplemental security income ("SSI"). Dkt. 3.  
18 Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13,  
19 the parties have consented to have this matter heard by the undersigned Magistrate Judge. *See*  
20 Dkt. 5.

21 The Court concludes the ALJ did not err when he did not (1) reopen Plaintiff's prior  
22 application for disability benefits; (2) include records from her prior application to the pending  
23 application; and (3) include fibromyalgia or rheumatoid arthritis as one of Plaintiff's medically  
24 determinable impairments; (4) nor did the ALJ fail in his consideration of the medical evidence.

ORDER REVERSING AND REMANDING  
DEFENDANT'S DECISION TO DENY BENEFITS

1 However, the ALJ failed to give legally sufficient reasons to discount Plaintiff's testimony and  
2 evidence from her family members. Had the ALJ properly considered this evidence, the residual  
3 functional capacity ("RFC") may have included additional limitations. The ALJ's error is  
4 therefore not harmless, and this matter is reversed and remanded pursuant to sentence four of 42  
5 U.S.C. § 405(g) to the Commissioner of Social Security for Operations ("Commissioner") for  
6 further proceedings consistent with this Order.

#### 7 FACTUAL AND PROCEDURAL HISTORY

8 On March 25, 2015, Plaintiff filed an application for SSI, alleging disability as of June 1,  
9 2011. *See* Dkt. 8, Administrative Record ("AR") 15. The application was denied upon initial  
10 administrative review and on reconsideration. *See id.* A hearing was held before Administrative  
11 Law Judge ("ALJ") Allen G. Erickson on November 17, 2016. *See id.* In a decision dated  
12 January 12, 2017, the ALJ determined Plaintiff to be not disabled. *See* AR 25. Plaintiff's request  
13 for review of the ALJ's decision was denied by the Appeals Council, making the ALJ's decision  
14 the final decision of the Commissioner. *See* AR 1; 20 C.F.R. § 404.981, § 416.1481.

15 In Plaintiff's Opening Brief, Plaintiff maintains the ALJ erred by: (1) refusing to reopen  
16 Plaintiff's prior application for disability benefits; (2) failing to fully and fairly develop the  
17 record by not incorporating evidence from Plaintiff's prior disability application to the current  
18 file; (3) failing to properly evaluate the medical record, including diagnoses of fibromyalgia and  
19 rheumatoid arthritis; (4) improperly discounting Plaintiff's symptom testimony; (5) improperly  
20 discounting lay evidence; and (6) therefore failing to properly assess Plaintiff's residual  
21 functional capacity ("RFC"). *See* Dkt. 12.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4

DISCUSSION

**I. Whether the ALJ appropriately refused to reopen Plaintiff’s prior application for disability benefits.**

Plaintiff contends the ALJ erred by refusing to reopen her prior application for disability benefits. Dkt. 12, pp. 3-4. However, absent a constitutional challenge, neither the Administrative Procedure Act nor section 205(g) of the Social Security Act authorizes judicial review of the Commissioner’s decision to not reopen a previously adjudicated claim for social security benefits. *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

Here, Plaintiff requested to reopen her prior application for disability benefits at the hearing on November 17, 2016. AR 83. In his written opinion, the ALJ denied Plaintiff's request because Plaintiff had not presented "new and material evidence . . . for the period in question." AR 15. Plaintiff argues that because her March 25, 2015 application for disability benefits was less than one year after the initial determination on the previous application, "the March 20, 2014 determination could have been opened for any reason." Dkt. 12, p. 3. However, Plaintiff has not alleged a violation of her constitutional rights; therefore, the Court concludes the ALJ did not err in refusing to reopen Plaintiff's prior application for disability.

Plaintiff contends the ALJ violated his duty to fully and fairly develop the record by not adding Plaintiff's disability files from her prior application to the current application. Dkt. 12,

1 pp. 3-4. Although an ALJ has a duty to develop the record when “there is ambiguous evidence or  
2 when the record is inadequate to allow for proper evaluation of the evidence,” *Mayes v.*  
3 *Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) (internal citations omitted), Plaintiff provides  
4 only the conclusory assertion, “The ALJ’s failure to add this missing evidence to the file violated  
5 the ALJ’s duty to fully and fairly develop the record.” Dkt. 12 pp. 3-4. However, “a bare  
6 assertion of an issue does not preserve a claim.” *D.A.R.E. America v. Rolling Stone Magazine*,  
7 270 F.3d 793, 793 (9th Cir.2001) (internal citations omitted). Plaintiff has not identified what  
8 specific materials from her prior application the ALJ failed to consider, what evidence in the  
9 record is ambiguous, nor how the record is inadequate to allow for proper evaluation of the  
10 evidence. *See* Dkt. 12 pp. 3-4. Therefore, the Court concludes the ALJ did not err in failing to  
11 add Plaintiff’s prior disability files to the current application. *See Carmickle v. Comm’r, Soc. Sec.*  
12 *Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (the court will not consider an issue that a  
13 Plaintiff fails to argue “with any specificity in his briefing”).

14 **III. Whether the ALJ properly considered all of Plaintiff’s impairments at Step**  
15 **Two of the sequential evaluation process.**

16 Plaintiff contends the ALJ erred at step two of the sequential evaluation process in failing  
17 to find medically determinable impairments of fibromyalgia and rheumatoid arthritis. Dkt. 12 p.  
18 11.

19 Step Two of the Social Security Administration’s (“SSA’s”) evaluation process requires  
20 the ALJ to determine whether the claimant “has a medically severe impairment or combination  
21 of impairments.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation omitted); *see*  
22 *also* 20 C.F.R. § 404.1520(a)(4)(ii) (2012). An impairment is “not severe” if it does not  
23 “significantly limit” the ability to conduct basic work activities. 20 C.F.R. § 404.1521(a)  
24

1 (effective through March 26, 2017).<sup>1</sup> “Basic work activities are ‘abilities and aptitudes necessary  
2 to do most jobs, including, for example, walking, standing, sitting, lifting, pushing, pulling,  
3 reaching, carrying or handling.’” *Smolen*, 80 F.3d at 1290 (quoting 20 C.F.R. § 140.1521(b)). An  
4 impairment or combination of impairments “can be found ‘not severe’ only if the evidence  
5 establishes a slight abnormality having ‘no more than a minimal effect on an individual[’]s  
6 ability to work.’” *Id.* (quoting *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (adopting  
7 Social Security Ruling (“SSR”) 85-28)).

#### 8 A. Fibromyalgia

9 The Administration follows Social Security Ruling (“SSR”) 12-2p when determining  
10 whether fibromyalgia is a medically determinable impairment. *See* SSR 12-2p, 2012 WL  
11 3104869 (July 25, 2012). In finding fibromyalgia a medically determinable impairment, the  
12 Commissioner cannot rely on a physician’s diagnosis alone; rather, “the evidence must document  
13 that the physician reviewed the person’s medical history and conducted a physical exam.” *Id.* at  
14 \*2. Furthermore, SSR 12-2p “designates two separate sets of diagnostic criteria that can establish  
15 fibromyalgia as a medically determinable impairment.” *Rounds v. Comm’r of Soc. Sec. Admin.*,  
16 807 F.3d 996, 1005 (9th Cir. 2015) (citing SSR 12-2p). Under the first set of criteria,  
17 fibromyalgia may be a medically determinable impairment if the claimant has (1) a history of  
18 widespread pain; (2) at least 11 tender points; and (3) “[e]vidence “that other disorders that could  
19 cause the symptoms or signs were excluded.” SSR 12-2p, 2012 WL 3104869, at \*2-3. According  
20 to the second set of criteria, fibromyalgia may be a medically determinable impairment if the  
21 claimant has (1) a history of widespread pain; (2) “[r]epeated manifestations” of six or more  
22

---

23 <sup>1</sup> The Court “applies the law in effect at the time of the ALJ’s decision.” *Rose v. Berryhill*, 256 F.Supp.3d 1079,  
24 1083 n.3 (C.D. Cal. 2017) (citations omitted).

1 fibromyalgia symptoms, signs, or co-occurring conditions; and (3) “[e]vidence that other  
2 disorders that could cause these repeated manifestations of symptoms, signs, or co-occurring  
3 conditions were excluded.” *Id.* at 3.

4 Here, the ALJ found other disorders that could cause the symptoms or signs of  
5 fibromyalgia were not excluded in light of record evidence showing Plaintiff’s complaints of  
6 diffuse pain were “likely secondary to a conversion disorder.” AR 18 (citing AR 426-429, 568,  
7 586). This affected Plaintiff under both sets of criteria for establishing fibromyalgia. The ALJ  
8 also noted, relevant to the first set of criteria, there is no evidence that 11 tender points were  
9 palpated. AR 18.

10 Although Defendant concedes that Plaintiff’s treatment notes show Plaintiff’s positive  
11 tender points for fibromyalgia exceeded the required number of 11 on several occasions, Dkt. 16  
12 p. 7, substantial evidence supports the ALJ’s findings with respect to fibromyalgia because  
13 Plaintiff has not met the burden to show that other disorders that could cause her symptoms,  
14 signs, or co-occurring conditions of fibromyalgia were excluded. *See* SSR 12-2p, 2012 WL  
15 3104869, at \*2-3.

16 Plaintiff argues “Dr. [James] Nakashima’s findings establish the diagnosis of  
17 fibromyalgia consistent with the requirements in SSR 12-2p[.]” Dkt. 12 p. 11. Plaintiff, however,  
18 does not explain how Dr. Nakashima’s findings are consistent with the requirements of SSR 12-  
19 2p. *See id.* Furthermore, while Dr. Nakashima’s treatment notes assess fibromyalgia on some  
20 occasions and note positive tender points, they do not indicate other disorders that could cause  
21 the symptoms or signs were excluded. *See* AR 448-451, 455. On the contrary, Dr. Nakashima  
22 consistently diagnosed other disorders that may have the same or similar symptoms or signs as  
23 fibromyalgia including lupus and undifferentiated connective tissue disease. *See e.g.*, AR 448,  
24

1 449, 450, 452, 455, and 654. Rheumatologic disorders, which include systemic lupus  
2 erythematosus and undifferentiated and mixed connective tissue disease, are among the “other  
3 disorders that may have symptoms or signs that are the same or similar to those resulting from  
4 [fibromyalgia][.]” *See* SSR 12-2p \*3 n 7; 20 C.F.R. § Pt. 404, Subpt. P, App. 1 § 14.00.  
5 (effective September 29, 2016 to January 16, 2017). As Dr. Nakashima’s treatment notes do not  
6 indicate lupus and undifferentiated connective tissue disease were excluded as the cause of  
7 Plaintiff’s symptoms, substantial evidence supports the ALJ’s determination that fibromyalgia is  
8 not a medically determinable impairment under SSR 12-2p.

9 B. Rheumatoid Arthritis

10 Plaintiff contends the ALJ’s finding “that the evidence is ‘insufficient’ to support a  
11 diagnosis of rheumatoid arthritis” is not supported by substantial evidence. Dkt 12 p. 11 (citing  
12 AR 18).

13 To the extent Plaintiff argues the ALJ’s finding that rheumatoid arthritis is not one of  
14 Plaintiff’s medically determinable impairments, her argument is conclusory, as her only support  
15 is a short statement, without citation to the record, that “there are many findings from many  
16 physicians supporting a diagnosis of rheumatoid arthritis.” Dkt. 12 p. 11. While there are two  
17 references to rheumatoid arthritis diagnoses buried in Plaintiff’s 8-page summary of medical  
18 evidence, the diagnoses themselves do not contradict the ALJ, who acknowledged diagnoses of  
19 rheumatoid arthritis. *See* AR 18. Plaintiff has not identified a legal standard, nor elaborated how  
20 the evidence of her rheumatoid arthritis meets this legal standard. *See* Dkt. 12, p. 11. As noted,  
21 “a bare assertion of an issue does not preserve a claim.” *D.A.R.E. America v. Rolling Stone*  
22 *Magazine*, 270 F.3d 793, 793 (9th Cir.2001) (internal citations omitted). Therefore, the ALJ did  
23  
24

1 not err in finding rheumatoid arthritis is not one of Plaintiff's medically determinable  
2 impairments. *See Carmickle*, 533 F.3d at 1161 n.2.

3 **IV. Whether the ALJ properly evaluated the medical evidence.**

4 Plaintiff broadly contends the ALJ failed to properly evaluate the "[m]edical [e]vidence."  
5 Dkt. 12 p. 4. She dedicates nearly eight pages of her Opening Brief reciting medical records. *See*  
6 *id.* at pp. 4-11. However, she offers no cogent reasons, apart from the challenges regarding  
7 fibromyalgia and rheumatoid arthritis, how the medical evidence warrants overturning the ALJ's  
8 decision. *See id.* The Court therefore finds the ALJ did not err in evaluating the medical  
9 evidence. The Ninth Circuit has repeatedly admonished the Court cannot manufacture arguments  
10 for a party. Rather, we "review only issues which are argued specifically and distinctly in a  
11 party's opening brief." *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir.  
12 2003) (citing *D.A.R.E. America v. Rolling Stone Magazine*, 270 F.3d 793, 793 (9th Cir.2001)). It  
13 is Plaintiff's burden to present the Court with legal arguments to support her claims. *See id.* at  
14 930. Absent argument, the Court declines to pick through her extensive recitation of the medical  
15 record to match evidence to unarticulated legal theories. *See id.*

16 **V. Whether the ALJ properly assessed Plaintiff's testimony**

17 Plaintiff contends the ALJ erred by failing to provide clear and convincing reasons to  
18 reject her testimony. Dkt. 12, pp. 11-15. The Court agrees.

19 To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent  
20 reasons for the disbelief." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995) (citation omitted).  
21 The ALJ "must identify what testimony is not credible and what evidence undermines the  
22 claimant's complaints." *Id.*; *see also Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Unless  
23 affirmative evidence shows the claimant is malingering, the ALJ's reasons for rejecting the  
24



1 claimant’s testimony must be “clear and convincing.” *Lester*, 81 F.3d at 834 (citation omitted).  
2 While the SSA’s regulations have eliminated references to the term “credibility,” the Ninth  
3 Circuit has held its previous rulings on claimant’s subjective complaints – which use the term  
4 “credibility” – are still applicable.<sup>2</sup> *See* SSR 16-3p, 2016 WL 1119029 (Mar. 16, 2016); 2016  
5 WL 1237954 (Mar. 24, 2016); *see also Trevizo v. Berryhill*, 871 F.3d 664, 678 n.5 (9th Cir.  
6 2017) (noting SSR 16-3p is consistent with existing Ninth Circuit precedent). Questions of  
7 credibility are solely within the ALJ’s control. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir.  
8 1982). The Court should not “second-guess” this credibility determination. *Allen*, 749 F.2d at  
9 580.

10 Here, Plaintiff testified that lupus is the primary condition that prevents her from  
11 working. AR 47. Her lupus symptoms allegedly include pain and swelling in the joints, fatigue,  
12 blisters on mucus membranes and skin, and seizures. *Id.* Plaintiff claimed she has joint swelling  
13 in her hands at least once a week, and also experiences joint pain in the hips, shoulders, and  
14 knees. AR 81. On typical day, her pain is allegedly in the range of 5-6 on a scale of 1-10. AR 62.  
15 She claimed when her hands are swollen, she cannot carry her 3-4 pound purse. AR 82.

16 Plaintiff testified she experiences seizures five to six times a week. AR 49. During  
17 seizures, she allegedly experiences muscle cramping and sometimes loss of bladder control. AR  
18 53. Plaintiff claimed to have no recollection of what happens during a seizure, as she typically  
19 “lose[s] spaces of time” from 20 minutes to a couple of hours. AR 52.

20 Plaintiff claimed her medications to treat lupus have had only a “minimal effect”: at one  
21 time she was on methotrexate, a chemotherapy derivative, but her doctor removed her from the  
22

---

23  
24 <sup>2</sup> Because the applicable Ninth Circuit case law refers to the term “credibility,” the Court uses the terms “credibility”  
and “subjective symptom testimony” interchangeably.

1 drug because it caused her to lose all of her hair; another time she obtained some benefit from the  
2 drug Benlysta, but was forced to stop using the drug because her insurance refused to cover it.  
3 AR 48-49. She testified she is on Keppra, and from what she understands, her seizures since  
4 “upp[ing] the dosage” have not been as severe or are lasting as long, although there has been no  
5 reduction in frequency. AR 51; 57.

6 The ALJ determined Plaintiff’s severe medically determinable impairments could  
7 reasonably be expected to cause the alleged symptoms, but discounted Plaintiff’s testimony  
8 regarding the intensity, persistence, and limiting effects of her symptoms because (1) “the  
9 objective diagnostic and clinical findings do not support the claimant having a seizure disorder,  
10 or swelling of the brain[;]” (2) Plaintiff’s complaints in May 2015 and July 2015 of stroke-like  
11 conditions were found to be without anatomic basis, and she was subsequently diagnosed with  
12 conversion disorder; (3) “the evidence . . . has not supported the [Plaintiff’s] complaints of  
13 rheumatoid arthritis[;]” and doctors frequently described Plaintiff with no constitutional  
14 symptoms, normal physical exams, normal gait, no apparent distress, normal range of motion,  
15 and no tenderness or swelling in the joints; and (4) Plaintiff’s lupus symptoms have waxed and  
16 waned. AR 21-22.

17 First, the ALJ noted “the objective diagnostic and clinical findings do not support the  
18 claimant having a seizure disorder, or swelling of the brain.” AR 21. However, on August 28,  
19 2015, neurologist Zhongzeng Li, M.D., noted Plaintiff “has SLE [systemic lupus erythematosus]  
20 which is [a] risk factor for seizure disorder. The description of her episodes suggest [sic] partial  
21 seizures.” AR 616. On October 16, 2015, Dr. Nakashima reviewed Plaintiff’s medical history,  
22 diagnosed systemic lupus, and noted: “Seizures most likely related to lupus. Seizure[s] are  
23 steroid responsive.” AR 649. In light of this evidence, the record contradicts the ALJ’s  
24

1 determination that Plaintiff's seizure disorder is not supported by "the objective diagnostic and  
2 clinical findings." Furthermore, to the extent the ALJ implies Plaintiff's normal results on CTs  
3 and MRIs of the brain, head and neck are inconsistent with a seizure disorder, the Court is  
4 cautioned to resist the temptation to interpret raw medical evidence, because lay intuitions about  
5 medical phenomena are often wrong. *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990).  
6 Plaintiff's physicians, not the ALJ, were in the position to determine whether Plaintiff's CT and  
7 MRI results are relevant to the validity of a seizure disorder.

8         Second, the ALJ noted the lack of objective findings for the left side numbness and  
9 weakness (or "stroke-like symptoms") Plaintiff displayed in May and July of 2015. AR 21. The  
10 ALJ also noted that consistent with the lack of objective findings, Plaintiff was diagnosed with  
11 conversion disorder. *Id.* However, a conversion disorder diagnosis is not on its own a good basis  
12 for concluding she is exaggerating her symptoms, only that some of the symptoms she  
13 experienced may be at least partly psychological in origin. *See Hanes v. Colvin*, 651 F. App'x  
14 703, 707 (9th Cir. 2016). Furthermore, the fact physicians were initially unable to pinpoint a  
15 cause for the stroke-like symptoms Plaintiff displayed in May and July of 2015 does not  
16 necessarily mean she was faking her symptoms. By August of 2015, similar episodes of paralysis  
17 and tingling in the limbs were interpreted by Dr. Li as complex partial seizures. *See* AR 615-616.  
18 Given Plaintiff's constellation of impairments, the lack of initial objective medical findings from  
19 Plaintiff's physicians regarding the source of her stroke-like symptoms is not a clear and  
20 convincing reason to discount her symptom testimony.

21         Third, the ALJ noted evidence does not support Plaintiff's "complaints of rheumatoid  
22 arthritis." But the ALJ failed to explain how the lack of support for rheumatoid arthritis means  
23 Plaintiff could not have experienced joint pain. At the hearing, Plaintiff testified that her joint  
24

1 pain is a symptom of her lupus. AR 47. Hence, a lack of support for rheumatoid arthritis does not  
2 necessarily warrant discounting Plaintiff's testimony about joint pain. *See Blakes v. Barnhart*,  
3 331 F.3d 565, 569 (7th Cir. 2003) (citations omitted) ("We require the ALJ to build an accurate  
4 and logical bridge from the evidence to [his] conclusions so that we may afford the claimant  
5 meaningful review of the SSA's ultimate findings.").

6 The ALJ also noted doctors frequently described Plaintiff with no constitutional  
7 symptoms, normal physical exams, normal gait, no apparent distress, normal range of motion,  
8 and no tenderness or swelling in the joints. AR 21-22. This, however, is consistent with  
9 Plaintiff's testimony that she experiences variable pain, with greater pain coinciding with lupus  
10 flares aggravated by stress. *See* AR 262. While some treatment notes do not contain reports of  
11 joint pain and swelling, many do. Various treatment reports from autumn of 2014 through  
12 autumn of 2015 note positive findings for joint pain, joint swelling, joint stiffness, and  
13 arthralgias. *See* AR 371, 380, 359, 361, 354, 478, 648. Plaintiff was also described during this  
14 time as moving slowly and in obvious pain during a mental evaluation with Marsha Hedrick,  
15 Ph.D. AR 444. In light of the record as a whole, sporadic treatment reports with no findings  
16 related to joint pain are not a clear and convincing reason to discount Plaintiff's symptom  
17 testimony. *See Reddick v. Chater*, 157 F.3d 715, 722-23 (9th Cir. 1998) (an ALJ must not "cherry-  
18 pick" certain observations without considering their context).

19 Lastly, the ALJ noted Plaintiff's lupus has waxed and waned, and that with sufficient  
20 treatment, her lupus was described as stable by her treating physician in December 2014. AR 22  
21 (citing AR 451). However, a fuller view of the record suggests Plaintiff continued to experience  
22 worsening lupus symptoms after December of 2014. Treatment notes of March 2015 express  
23 worsening joint pain and a photosensitive rash on the face, with the doctor recommending more  
24

1 aggressive lupus treatment. AR 452. By May 2015 Plaintiff was admitted to the hospital for left  
2 side numbing, tingling, and weakness “possibl[y] secondary to lupus.” *See* AR 454. Treatment  
3 reports into October 2015 describe worsening symptoms, with seizures “most likely related to  
4 lupus.” AR 649. In view of the complete record, Plaintiff’s sporadic asymptomatic moments are  
5 not a clear and convincing reason to discount her testimony regarding the intensity of her  
6 symptoms.

7 For the above stated reasons, the Court finds the ALJ failed to provide clear and  
8 convincing reasons, supported by substantial evidence in the record, to discount Plaintiff’s  
9 symptom testimony. Accordingly, the ALJ erred.

10 Harmless error principles apply in the Social Security context. *Molina v. Astrue*, 674 F.3d  
11 1104, 1115 (9th Cir. 2012). An error is harmless only if it is not prejudicial to the claimant or  
12 “inconsequential” to the ALJ’s “ultimate nondisability determination.” *Stout v. Comm’r Soc. Sec.*  
13 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674 F.3d at 1115. The determination  
14 as to whether an error is harmless requires a “case-specific application of judgment” by the  
15 reviewing court, based on an examination of the record made “‘without regard to errors’ that do  
16 not affect the parties’ ‘substantial rights.’” *Molina*, 674 F.3d at 1118-19 (quoting *Shinseki v.*  
17 *Sanders*, 556 U.S. 396, 407 (2009)).

18 Here, Plaintiff testified regarding limitations that are greater than the limitations set forth  
19 in the ALJ’s RFC determination. The ALJ determined Plaintiff “should avoid exposure to  
20 hazards secondary to psuedoseizure episodes[;]” however, no limitations regarding interruptions  
21 to work were included in the RFC. AR 20. Yet Plaintiff testified she experiences seizures five to  
22 six times a week, AR 49, during which “she loses space[s] of time” from 20 minutes to a couple  
23 of hours, and occasionally loses control of her bladder. AR 52. The ALJ may have included  
24

1 additional limitations regarding interruptions to work had the ALJ fully credited Plaintiff's  
2 testimony regarding her seizures. In turn, these limitations may have been conveyed to the  
3 vocational expert ("VE"), affecting the ultimate disability determination. Because the ultimate  
4 disability determination may have changed with proper consideration of Plaintiff's testimony, the  
5 ALJ's error is not harmless and requires reversal.

6 **VI. Whether the ALJ properly assessed lay witness evidence.**

7 Plaintiff contends the ALJ erred by failing to address lay evidence from her husband,  
8 mother, and mother-in-law. Dkt. 12, pp. 15-18. The Court agrees.

9 Lay testimony regarding a claimant's symptoms "is competent evidence that an ALJ must  
10 take into account." *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001). As such, lay witness  
11 testimony "cannot be disregarded without comment." *Nguyen v. Chater*, 100 F.3d 1462, 1467  
12 (9th Cir. 1996) (citations omitted). To reject lay witness testimony, the ALJ must "expressly"  
13 disregard such testimony and provide "reasons germane to each witness for doing so." *Lewis*,  
14 236 F.3d at 511. In rejecting lay testimony, the ALJ need not cite the specific record as long as  
15 "arguably germane reasons" for dismissing the testimony are noted, even if the ALJ does "not  
16 clearly link his determination to those reasons," and substantial evidence supports the ALJ's  
17 decision. *Id.* at 512.

18 Here, Plaintiff's mother and mother in law each submitted written statements regarding  
19 Plaintiff's seizures. AR 347, 348. Furthermore, Plaintiff's husband provided a written statement  
20 and oral testimony regarding Plaintiff's impairments at the November 2016 hearing. AR 55-58,  
21 268-275. However, the ALJ's written opinion does not mention any lay evidence. *See* AR 15-25.  
22 Under these circumstances, the ALJ has failed to give "reasons germane to each witness" to  
23  
24

1 disregard the lay testimony in this case. *See Nguyen*, 100 F.3d at 1467 (lay witness testimony  
2 “cannot be disregarded without comment”).

3 As noted, an error is harmless only if it is not prejudicial to the claimant or  
4 “inconsequential” to the ALJ’s “ultimate nondisability determination.” *Stout v. Comm’r Soc. Sec.*  
5 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674 F.3d at 1115. Defendant contends  
6 any error in the ALJ’s failure to comment on the lay testimony is harmless because the lay  
7 testimony merely repeated much of Plaintiff’s testimony, which the ALJ rejected for clear and  
8 convincing reasons. Dkt. 16, pp. 14-15. This argument is not persuasive because the ALJ’s  
9 reasons for rejecting Plaintiff’s testimony, as determined above, were not clear and convincing.

10 The lay witnesses in this case described limitations that are greater than the limitations set  
11 forth in the ALJ’s RFC determination. Plaintiff’s mother and mother-in-law submitted letters  
12 stating they each watch over Plaintiff 2-3 times a week in case a seizure occurs when others are  
13 unavailable to provide support. *See* AR 347, 348. Plaintiff’s husband corroborated Plaintiff’s  
14 testimony regarding the number of seizures she experiences, AR 77, and noted she comes out of  
15 her seizures very disoriented, and that she sometimes takes several hours to regain the faculties  
16 for a full conversation. AR 79. He also described her symptoms during a seizure, noting that  
17 during her “tonic clonic” seizures, she appears non responsive and clenches her hands, while her  
18 “grand mal” seizures are scary and violent, and she flails her arms and bounces her head off the  
19 floor. AR 76-77. This evidence could result in Plaintiff experiencing significant interruptions to a  
20 workday/week due to seizures. As noted, however, the ALJ’s RFC determination does not  
21 include limitations for interruptions to work. Because the ultimate disability determination may  
22 have changed with proper consideration of the evidence from Plaintiff’s husband, mother, and  
23 mother-in-law, the ALJ’s error is not harmless and requires reversal.

1       **VII. Whether the ALJ properly assessed Plaintiff's RFC**

2       Lastly, Plaintiff asserts the ALJ's RFC assessment and Step Five findings were  
3 erroneous. Dkt. 12, pp. 18-19.

4       The Court has found the ALJ committed harmful error and has directed the ALJ to  
5 reassess Plaintiff's testimony and the lay evidence on remand. *See* Sections V-VI., *supra*. Hence,  
6 the ALJ is directed to reassess the RFC on remand. *See Valentine v. Comm'r of Soc. Sec. Admin.*,  
7 574 F.3d 685, 690 (9th Cir. 2009) ("an RFC that fails to take into account a claimant's  
8 limitations is defective"). As the ALJ must reassess Plaintiff's RFC on remand, the ALJ is  
9 directed to re-evaluate Step Five to determine whether there are jobs existing in significant  
10 numbers in the national economy Plaintiff can perform given the RFC. *See Watson v. Astrue*,  
11 2010 WL 4269545, at \*5 (C.D. Cal. Oct. 22, 2010) (finding the RFC and hypothetical questions  
12 posed to the VE defective when the ALJ did not properly consider two physicians' findings).

13       **VIII. Whether an award of benefits is warranted.**

14       Lastly, Plaintiff requests the Court remand this case for an award of benefits. Dkt. 3 p. 2.  
15 The Court may remand a case "either for additional evidence and findings or to award benefits."  
16 *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1992). Generally, when the Court reverses an  
17 ALJ's decision, "the proper course, except in rare circumstances, is to remand to the agency for  
18 additional investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004)  
19 (citations omitted). However, the Ninth Circuit created a "test for determining when evidence  
20 should be credited and an immediate award of benefits directed." *Harman v. Apfel*, 211 F.3d  
21 1172, 1178 (9th Cir. 2000). Specifically, benefits should be awarded where:

22       (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the  
23 claimant's] evidence, (2) there are no outstanding issues that must be resolved  
24 before a determination of disability can be made, and (3) it is clear from the record



1 that the ALJ would be required to find the claimant disabled were such evidence  
2 credited.

3 *Smolen*, 80 F.3d at 1292.

4 In this case, the Court has determined the ALJ committed harmful error and has directed  
5 the ALJ to re-evaluate Plaintiff's testimony, the lay witness evidence from Plaintiff's husband,  
6 mother, and mother-in-law, the RFC, and the Step Five findings on remand. Because outstanding  
7 issues remain regarding what weight, if any, to give Plaintiff's testimony and the lay witness  
8 evidence; and determination of the RFC and Plaintiff's ability to perform jobs existing in  
9 significant numbers in the national economy, remand for further consideration of this matter is  
10 appropriate.

#### 11 CONCLUSION

12 Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded  
13 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is reversed and  
14 this matter is remanded for further administrative proceedings in accordance with the findings  
15 contained herein.

16 Dated this 6th day of February, 2019.

17 

18 David W. Christel  
19 United States Magistrate Judge  
20  
21  
22  
23  
24